STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

SC No.
COA No. 322655

Wayne County Circuit
Lower Court Case No.14-3800FH

vs.

DARIUS LAMARR FRANKLIN,

Defendant/Appellee.

APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant/Appellee, Darius Franklin's, motion to suppress invalid search warrant was denied by the trial court. Defendant/Appellee, Darius Franklin's, motion for hearing to suppress evidence pursuant to *Franks v Delaware* 438 US 154, 171-172 (1978) was granted. The evidence was suppressed and without any objection from the prosecutor the case dismissed. Plaintiff/Appellant sought leave to appeal to the Michigan Court of Appeals. Defendant/Appellee responded and oral argument was heard before the Court. In an Order and Opinion dated October 20, 2015, the Michigan Court of Appeals reversed and remanded for reinstatement of the charges against Defendant.

Mr. Franklin now seeks leave to appeal to this court. He seeks an order reversing the court of appeals and affirming the trial court's order to suppress the evidence and dismiss the case. Defendant/Appellee also seeks an order reversing the trial court's order denying Mr. Franklin's motion to suppress based on an invalid search warrant.

Jurisdiction is conferred on this Court by MCR 7.301; MCR 7.303; MCR 7.305; MCL 600.212; MCL 600.215; MCL 600.219; MCL 600.232; MCL 600.314 and MCL 770.3(6).

STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in reversing and remanding for reinstatement of the charges against Defendant?

Defendant/Appellee answer: "Yes

2. Whether the trial judge erred in denying Defendant's motion to suppress the invalid search warrant?

Defendant/Appellee answer: "Yes

Introduction

In deciding whether to grant Defendant's motion for a *Franks* hearing, the trial judge reviewed the affidavits of Ms. Jones and Mr. Franklin, which disputed the heavy front door traffic as alleged in the affidavit. He ordered the field notes and activity logs, which should state the time and location of when Officer Moore was on surveillance. But Officer Moore failed to provide the activity logs/field notes as ordered. The Court reviewed the search warrant return, which failed to list any seized evidence to indicate trafficking. The two bags of marijuana that were seized was inconsistent with the heavy traffic as alleged in the affidavit. The court reviewed the photographs of the location showing an unobstructed view from Ms. Jones' home to the target location. The affidavit of the search warrant failed to provide any facts to support that the confidential informant had any personal knowledge regarding the target location. The affidavit of the search warrant had material omissions that the confidential informant had never been to the target location. The above state facts were sufficient to form a substantial preliminary showing of untruths.

STATEMENT OF FACTS

An Affidavit in support of a search warrant for 15786 Freeland in the City of Detroit was subscribed and sworn to on March 21, 2014. In support of the search warrant, Officer Moore's Affidavit ***(See Exhibit B, Search Warrant)*** claimed that the following alleged facts supported issuance of the warrant:

(1) *That on March 11, 2014, Officer Moore was contacted by an unregistered confidential informant whom he has used over 10 times in the past resulting in confiscations of narcotics, weapons, and multiple felony arrests.*

(2) *That on March 21, 2014, Office Moore set up a surveillance operation where he observed 5 unknown individuals within a 30 minute period walk up to the target address and meet the seller to be searched (Black Male, 25-27 years old) from inside of the target location. After a brief conversation the individuals went inside through the front main entry door and then exited. The transaction took less than 1 minute to complete.*

(3) *That Office Moore questioned the last of the 5 individuals regarding the sale of marijuana at 15786 Freeland, who stated "they up right now just go to the front door and they will hook you up."*

As shown in the attached affidavit for the search warrant, the entire investigation was performed in less than 24 hours. The affidavit has bare bones general boilerplate language without any description to form a belief that the confidential informant exists or was speaking with actual

personal knowledge. The affidavit failed to state any facts to support a finding that the confidential informant was speaking with personal knowledge. The affidavit lacks any facts to support the reason the confidential informant was able to advise the officer-affiant that the sale of marijuana was occurring at the target address. The confidential informant failed to provide information to the officer such as the name of the alleged seller, how the sale of marijuana from the target address occurred, or a description of the marijuana packaging or its whereabouts. Furthermore, the affidavit lacks any facts to support the allegation that drug activity was occurring at the target address. Here, the officer-affiant failed to schedule any controlled buys. Although the officer claimed to have conducted surveillance, it was just one time in less than a 24 hour period. The officer did not observe any hand-to-hand exchanges; did not observe any of the individuals leave with packages, did not provide a timeframe between the comings and goings of each individual; did not verify that the individual he questioned possessed suspected marijuana, nor did he describe the packaging of the marijuana that was supposedly being sold. The only indication of marijuana was from an unidentified person without any history of existence, credibility or reliability whom was walking away from the area. Contrary to Officer Moore's belief, the bare bones and general language were insufficient facts to establish probable cause to search the target address.

Defense counsel filed a motion to quash the search warrant based on the absence of probable cause within the four corners of the search warrant. Judge Morrow denied Defendant's motion, but found that neither the confidential informant nor the unidentified person on the street assertions formed any basis to support issuance of the warrant. It is undisputed that the confidential informant was without personal knowledge that there was drug activity at Freeland. It is undisputed that the unknown person on the street did not have any history of reliability or credibility. **However, based on the photographs and affidavits of Ms. Jones and Mr. Franklin,**

the failure of Officer Moore to produce his activity log/field notes, any documents regarding the confidential informant and the failure of the search warrant return to show any evidence of trafficking, the trial court ordered a *Franks* hearing. The affidavit of Ms. Jones states that Mr. Franklin has been her neighbor for 4 years. Her affidavit also states that she has a clear view of Defendant's home, front porch, yard and side door. It further states that she had not seen anyone enter the home through the front door. Defendant Franklin provided an affidavit with photographs of his and Ms. Jones' homes. Mr. Franklin's affidavit states that no one had exited or entered his front door for over the past 6 months. In reading the affidavits of Ms. Jones and Mr. Franklin and absence of any facts in the search warrant affidavit from the confidential informant or any other person who claims to have entered into the Defendant's home, Judge Morrow properly ordered the *Franks* hearing. Based on affidavits, photographs, and the undisputed fact that the Defendant lives alone and did not match the description in the search warrant affidavit, the Defendant has provided the Court with the substantial preliminary showing of a deliberate and necessary falsehood set forth in paragraph 5 of the warrant affidavit. As stated on June 11, 2014, on pg. 13, L. 7 - 13, the trial judge had an issue with the credibility of the affidavit regarding the alleged facts in the four corners of the affidavit.

In support of Defendant's motion for a *Franks* hearing, the Defendant provided an affidavit, which stated that the Defendant's front door was not used for over the past 6 months, which directly contradicted the allegation of heavy traffic through the front door as stated in the search warrant. The affidavit further showed that no individual exited the front door in the past 6 months to speak to the police. Ms. Jones who lives directly across the street from Defendant's home for over 20 years stated she never saw anyone enter or exit the front door for the past 6 months; only the side door. The affidavit of Mr. Franklin and Ms. Jones were not guesses, but

based on actual personal knowledge. Ms. Jones and Mr. Franklin's statements that Defendant resided alone was undisputed. The Defendant's statement that no one enters his home through the front door is a fact of which he would have personal knowledge. The phantom 27 year old resident opening the front door was an untruth. If a 27 year old did not exist then he couldn't be opening and closing the front door allowing someone to exit the front door and approach Officer Moore.

Furthermore, prior to ordering the *Franks* hearing, the court ordered the affiant to surrender his field notes/activity logs along with other proof that the affiant performed the alleged surveillance. (June 11, 2014 Transcr pg. 13, L.14-20) The affiant failed to provide his field notes, activity log of any document to support the existence of the confidential informant. An activity log shows the dates and times of surveillance.

In addition to the above stated evidence, the court was provided with the search warrant return ***(Exhibit J).*** The search warrant return provided a list of all incriminating evidence that was seized. There were only two bags of marijuana. No scales or packaging. This is inconsistent with the alleged high and steady stream of drug traffic of 5 customers every 30 minutes as alleged in the search warrant affidavit.

The *Franks* hearing was held on July 2, 2014 and July 3, 2014. Defendant's first witness was Angela Jones who lived across the street from the Defendant. She testified that she had the opportunity to witness outside activity and she never saw anyone enter or exit out of the front door. ***(July 2, 2014 Transcript – Motion to Suppress, pg. 5, L.11-13 and L. 17-19)*** Furthermore, every time that she saw someone come to Defendant's house, she saw them come in through the side door, not the front door. ***(pg. 8, L.10-14)*** The photographs showed a clear view from Ms. Jones house to Defendant's house. This testimony completely refutes the affiant's sworn statement in his affidavit that he observed persons entering and exiting the front door. Moreover, the

Plaintiff/Appellant's assertion that Ms. Jones was not home during Officer Moore's March 21 surveillance is not relevant. Defense counsel maintained that the affiant failed to provide a time of the alleged traffic, any field notes or activity logs, and implied a continuous ongoing occurrence. Ms. Jones, a neighbor of 4 years, would have noticed such a pattern. Furthermore, as shown in the photographs ***(Exhibit E)***, Ms. Jones' front porch, side door, garage and all side windows are directly across from Defendant's home. The confidential informant, on which Officer Moore based his probable cause that drugs were being sold at the Freeland address, had no personal knowledge of drug sales nor had the confidential informant ever been at the subject location. ***(July 3 Transcript-Motion to Suppress, pg. 6, L12)*** As such, but for the allegation of the front door traffic, Judge Morrow did not believe that Officer Moore had any basis to move forward. ***(pg. 45, L.12-18)*** Defense counsel further asserted that Defendant met his burden for the *Franks* hearing by the sworn statements of Ms. Jones and Mr. Franklin, activity logs and affidavit omissions showing that the affiant's false allegations of drugs, exchanges and the alleged uncorroborated statement of marijuana sales by the unknown person were not true. Prior to having the hearing, Officer Moore failed to provide any field notes, activity logs or any evidence to corroborate the existence of the confidential informant. After ordering the hearing based on the proper preliminary showing of deliberate falsehood, Judge Morrow also believed that Officer Moore's testimony confirmed that the observations of Officer Moore were reckless and inconsistent with the evidence that was taken from the house. Judge Morrow as the finder of fact and credibility did not believe that any evidence supported Officer Moore's allegations of individuals coming to the Freeland address and sales of marijuana to them. Judge Morrow did not believe that an unknown individual allegedly told Officer Moore that he could obtain marijuana from Freeland. Judge Morrow did not believe that Officer Moore's statements in paragraph 5 happened. ***(pg. 48, L.24-25 and pg. 49 L. 1-3)***

ARGUMENT

I. The trial court did not err when it granted Defendant a *Franks* hearing because the Officer-Affiant knowingly and intentionally or with reckless disregard for the truth inserted false material into his sworn affidavit that was material to support a finding of probable cause. The Court of Appeals erred when it reversed and remanded for reinstatement of the charges against Defendant.

Standard of Review

The Defendant/Appellee would emphasize that the clear error standard of review is highly deferential to the trial court. *People v. McSwain*, 259 Mich App 654, 682-3 (2003). It is well established that regard be given to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

Discussion

Omissions- The Judge read the search warrant affidavit claiming that the seller was 27 years old. The Defendant was visibly over 40 years of age. The undisputed police reports and affidavits stated that Defendant lived alone. While Officer Moore failed to provide field notes, activity logs or any other evidence that the confidential informant was previously used by the affiant or that the affiant conducted surveillance of the days as stated in the affidavit.

Judge Morrow had a legal basis to suppress the evidence in this case: he was authorized to order a *Franks* hearing, the four corners of the warrant affidavit did not supply probable cause (despite Judge Morrow's opinion as to probable cause), and the good-faith exception does not apply. The requirement for a search warrant is stated as follows by the Michigan Supreme Court in *People v. Fons*, 223 Mich 603, 606, 194 NW 543, 544 (1923):

> 'The warrant does not issue from the mere fact of the filing of an affidavit, but from the finding of good cause on legal evidence. The law contemplates a showing before a magistrate, such a showing as satisfies him that a crime has been committed.'

In *People v. Moten*, 233 Mich 169, 171, 204 NW 506, 507 (1925), the Michigan Supreme Court stated:

> 'It is settled law in this jurisdiction and generally elsewhere that an affidavit for a search warrant, made only on information and belief, is insufficient to move the judicial discretion of the issuing officer. It must also contain, as distinguished from mere conclusions or belief, known materials facts directly stated as affiant's grounds for such belief.'

2 Gillespie, Michigan Criminal Law & Procedure (2d Ed.) Search and Seizure, s. 868, p. 1129, states:

> 'The affidavit must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or belief. An affidavit made on information and belief is not sufficient. The affidavit should clearly set forth the facts and circumstances within the knowledge of the person making it, which constitute the grounds of the application. The facts should be stated by distinct averments, and must be such as in law would make out a cause of complaint. It is not for the affiant to draw his own inferences. He must state matters which justify the drawing of them.' (Emphasis added)

The Plaintiff/Appellant sets forth clearly that "the magistrate must be able to reasonably include that the person had personal knowledge and was credible or that the information was reliable." (Plaintiff/Appellant's Brief on Appeal, pg. 8)

A. In this case, there was not probable cause for issuance of the warrant. Plaintiff/Appellant maintains that "the magistrate did not rely on the unregistered informant statement to Officer Moore to find probable cause….it was Officer Moore's personal observations on that date that established probable cause…." (Again, Defendant/Appellee maintains, in spite of Judge Morrow's opinion that there was not probable cause).

In *People v. Rosborough*, 387 Mich 183, 196-197 (1972), the Court considered the sufficiency of probable cause in an affidavit similar to the one in this case:

> **On August 5, 1964, Officer Aldo Corso executed an affidavit for a search warrant for 5656 Lawton, Detroit. This affidavit (reproduced as an Appendix to this opinion) consists of a one-page printed form with various**

> **insertions typed in and three typewritten pages setting forth observations of the officer. It will be noted that the printed form states that the officer has probable cause to believe that the premises for which the warrant was sought are used as and for a common gaming house. The basis for probable cause is stated in the printed form to be the fact that the officers is thoroughly familiar with all the methods and manners in which a mutual numbers gambling enterprise is operated. The printed form also states that certain persons had been identified to the officer either by name or be description as participating in the operation of a mutual gambling business. How this information was obtained by the officer or the reliability of the same is not stated.**
>
> **The typewritten portion of the affidavit following the printed form details the observations of the officer with regard to various persons seen by him entering and leaving various premises. The only statements by the officer with regard to the activities of these persons, other than the fact that he saw them enter and leave various premises; are: 'deponent saw him carrying a brown paper bag'; 'he got out of the car carrying a large paper bag'; 'he got out of the car carrying a large paper bag, and walk to and enter 5656 Lawton'; 'deponent saw Mary Doe No. 2 walk from the east carrying a large handbag and enter 5656 Lawton'; 'he got out of the car carrying a package under his arm and entered 5656 Lawton'; 'He got out of the car carrying a package under his right arm and entered 5656.**

In holding that there was insufficient probable cause to authorize issuance of the search warrant, the Court cited the case of *People v. Effelberg*, 220 Mich 528, 190 NW 727 (1922):

> **In the case of People v. Effelberg, 220 Mich 528, 190 NW 727 (1922), an affidavit with striking similarity to the one in this case was considered by Justice Clark, writing for the whole Court. He states (p. 531, 190 NW p. 728):**
>
> > **'Rejecting the parts of the complaint avowedly stated on information and belief, there remain the following:**
> >
> > **"Which said premises are occupied by one George Effelberg as a public place where liquors are manufactured and furnished and possessed.* * *"**
> >
> > **"Wine, whisky, etc., *** are being manufactured and possessed for the purpose of being sold, furnished or given away as a beverage, contrary to the provisions of Act No. 338 of the Public Acts of the State of Michigan for the year 1917, as amended. ***"**

> **"Numerous persons frequent the said building at various times of night and daytime unlawfully.***
>
> **"That intoxicating liquors are sold there and given away unlawfully.' 'In each of the statements just above quoted the affiant attempts to find and determine the ultimate fact that a violation of the law had been committed. It was not for him but the magistrate, the determine whether there was probable cause to justify issuing the search warrant. His statements are his conclusions and have no more force than if expressly stated on information and belief. Affiant should have stated to the magistrate on oath or affirmation the facts and circumstances, if any were known to him, which inducted the beliefs.**

Officer Moore alleged that probable cause existed to believe that the Freeland address was operating as a narcotics trafficking enterprise. The basis for probable cause was the information from a) the unregistered informant whom Officer Moore knew had absolutely no personal knowledge; b) Officer Moore's independent observations; and 3) the conversation with an unknown individual allegedly coming from Freeland who told Officer Moore that he could obtain marijuana from there. ***(Exhibit A, Search Warrant and Affidavit, paragraph 7)*** Neither the credibility nor reliability of the informant or the second random individual was established. Furthermore, Officer Moore testified that the confidential informant had never been to the home and was just repeating rumors. In paragraph 5, Officer Moore detailed alleged observations of various persons seen by him entering and leaving the Freeland address. The only statements by Officer Moore with regard to the activities of these persons is that they went to the front door and was met by the seller. Contrary to Rosborough and Effelberg, Officer Moore had no information about the seller and then claimed that the alleged seller was between 25-27 years old. (Defendant/Appellee is over 40 years old). The affidavits and testimony of the Defendant and Angela Jones confirms that the Defendant resides alone at the Freeland address. Also, Officer Moore testified that the Defendant was not the seller, which created doubt as to Officer Moore's credibility. This brought doubt as to Moore's allegation that, after a brief conversation with a 27

year old man, the buyers entered, stayed for a minute, and then left out the front door. Other than this, Officer Moore did not report any activity that would be indicative of drug sales. Officer Moore didn't see any drugs, drug transactions, alleged hand-to-hand exchanges. Officer Moore saw no money exchanged and he saw no small packages. He allegedly spoke to a random unknown individual -whom we have no way of finding or confirming their existence- who said Freeland was open for sales of marijuana. No marijuana had been seen on the premises nor was it known if any marijuana had been previously stored on the premises. Neither the informant nor the random individual was confirmed as speaking from personal knowledge. However, Officer Moore concluded that Defendant/Appellee was operating a narcotics trafficking enterprise at Freeland.

Similar to the holdings of Rosborough and Effelberg, Officer Moore's statements were his conclusions and were not based on facts and circumstances known to him which induced the beliefs and the conclusions stated. Contrary to Plaintiff/Appellant's argument, probable cause was not adequately supplied by the warrant affidavit.

B. Furthermore, the facts as set forth by the affiant did suggest that Officer Moore misled the magistrate or that the judge wholly abandoned his judicial role in approving the warrant. As set forth in the discussion above, Officer Moore had absolutely no credible or reliable information on which to justify or support the conclusions of Officer Moore based on the alleged observations. During the Franks hearing, it was found that paragraph 3 of the affidavit was based totally on rumors in which neither the confidential informant or Officer Moore had any personal knowledge or first-hand information. Furthermore, Officer Moore never stated in his affidavit that the confidential informant was credible. When Judge Morrow removed paragraph 3 from the affidavit, which supposedly explained why Officer Moore set up surveillance, paragraph 5 stands alone as necessary to the finding of probable cause. Without any credible or reliable information

in support of paragraph 5 to support probable cause that narcotics were inside the home, Judge Morrow adjourned the hearing and ordered Officer Moore to return with proof of his surveillance and the confidential informant's existence. Officer Moore provided neither. Defendant/Appellee's challenge to the affiant's credibility was proper and the *Franks* hearing was required. Judge Morrow did not believe Officer Moore:

> **Now, surely, if you say that the information that he received from the CI wasn't credible, and I'm saying it was not credible because there was no time, place, what, when, who, where, and I've already discussed that, then how can a conversation with an unknown individual coming from someplace be deemed credible and used as corroboration to justify the issuing of a search warrant?**
>
> **(July 3 Transcript – Motion to Suppress, pg. 48, L.3-10)**

As previously stated, the clear error standard of review is highly deferential to the trial court. *People v. McSwain*, 259 Mich App 654, 682-3 (2003). It is well established that regard be given to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). Furthermore, although not testified to in the preliminary showing pursuant to Franks, there was testimony brought out in the hearing itself that further confirmed Defendant/Appellee's challenges and Judge Morrow's initial belief that Officer Moore was not being truthful in his affidavit statement:

> **The only way to conclude that anything was consistent with anything is what was found on the return of search warrant. And that was that there was two bags of suspected marijuana that was seized. There were no items in connection with sales, manufacture, use, storage, distribution, transportation, delivery, concealment. There were no books, records, tally s sheets. There was none of anything that would support the indicia of sales and delivery of marijuana, except for the marijuana…**
> **The constitutional standard that has to be met, based on a totality of the circumstances, in this case fell sufficiently short of that that was necessary for the search warrant to be justifiably issued. The information that Mr. Moore provided in this particular search warrant, I believe, as it relates to what was necessary to be put in amounted, in this Court's opinion, to careless disregard for the truth, that was made in a reckless fashion.**

> **And I believe that, based on what was found in the home and the lack of corroboration between any of what he claims he observed, amounts to a reckless disregard for the truth. I don't think that it happened. And therefore, I'm going to suppress the information and grant the motion to suppress the information in the People versus Mr. Franklin.**
>
> **(pg. 47, L 18-25; pg. 48, L 1-2; and 15-25)**

Finding Officer Moore to be incredible where Officer Moore had no credible and reliable information on which to rely is not clearly erroneous.

C. A defendant is entitled to a hearing to challenge the validity of a search warrant if he makes a substantial preliminary showing that a false statement knowingly and intentionally was included by the affiant and if the false statement is necessary for the finding of probable cause. *Franks v Delaware* 438 US 154.

There is only one statement in the warrant that is relevant. That statement is paragraph 5 of the search warrant and affidavit, which states 5 individuals entered and exited Defendant's front door. The last person leaving the front door approached and spoke to Officer Moore. What is remotely possible when showing a falsity, besides a 24 hour certified video monitor of Defendant's home, but the Defendant and his next door neighbor of 4 years? If you are to find that when a Defendant provides a written affidavit that the door has not been used in 6 months and the next door neighbor of 4 years provides an affidavit that all visitors use the side door along with photographs showing a clear unobstructed view from her home to Defendant's home and with police reports showing no controlled buys, no allegations of any officer seeing suspicious hand-to-hand gestures or money being transferred, what else can you do? Oh yes, he could show search warrant returns that is inconsistent with heavy trafficking drug houses. Remember, it was alleged that 5 people came and left within 30 minutes, which equates to an average of 10 buys per hour. That means you should find approximately 240 individual packages for a one day supply. The

attached police report shows that there were 2 bags. How can you serve people in 1 minute if you are without pre-packaged drugs?

It is undisputed that paragraph 5 is necessary for the finding of probable cause. All other paragraphs were deemed incredible. It is also undisputed that Defendant showed a substantial showing that it was a false statement. It is for the trial judge to hear the evidence and decide whether the parties are truthful. Here, the Court of Appeals have stripped the trial court of its function as a finder of fact. Ms. Jones and Mr. Franklin stated under oath that no one entered the front door. The trial court believed them. The Court of Appeals says, so what, the trial judge has no right to read an affidavit and grant a hearing because he might believe the witness. The trial judge's ability to hear, see, and weigh the credibility of live witnesses is a lot more in depth and better suited than an appellate court who only reads the transcripts. So what, if an officer states that he saw a 2-headed dog and the neighbors' state that they did not. The officer is correct and the citizens should not have an opportunity to be heard.

D. Omissions

To facilitate a challenge due to the omissions in the affidavit, ***Franks*** granted defendants a limited right to an evidentiary hearing concerning the veracity of the affidavit. In the present case, Officer Moore omitted the fact that the confidential informant had no personal knowledge as to drug sales at the target location, had never been to the target house, seen the Defendant or saw any narcotics. Prior to ordering the *Franks* hearing, Judge Morrow ordered Officer Moore to bring his field notes and activity log along with any other evidence which would show the existence of the confidential informant. Officer Moore failed to bring either his field notes or activity logs or any corroboration of the confidential informant's existence. The activity log/field notes would have shown the whereabouts of the Officer during the time of which he

alleged he conducted surveillance. Based on the material omissions in the affidavit and the failure to bring activity logs, the Defendant was entitled to a *Franks* hearing.

E. The good-faith exception is not applicable here. As set forth in the discussions above, Defendant/Appellee has demonstrated that the officer affiant misled the magistrate through a false or reckless affidavit which, in turn, prompted Judge Morrow to order a *Franks* hearing. Officer Moore had no good-faith reason to believe that his actions were constitutionally justified. Here, in the present case, in reading the affidavit, you will notice that the affidavit lacks any words or certification by Officer Moore that the confidential informant is or has ever been deemed a credible or reliable informant. Yes, the affiant states that he used this unregistered informant in the past, but has not stated how many times the affiant informed him correctly or with personal knowledge. Here, the affiant misled the magistrate by failing to inform him/her that the confidential informant spoke without any personal knowledge. It is easily assumed that when the officer claims that the confidential informant gave prior information that the confidential informant spoke from personal knowledge. Here, it is undisputed that even if Officer Moore did have a confidential informant, Officer Moore knew that the confidential informant had never been to the target house, that the confidential informant never saw any narcotics, that the confidential informant had not met or seen the seller, and that the confidential informant never purchased/saw any marijuana. It is also undisputed that Officer Moore knew that this fictitious/phantom unknown individual who allegedly stated, "Yeah, they up right now, etc." cannot be deemed credible or reliable. Officer Moore knew that he did not have any credible or reliable information. Officer Moore knew that a well-trained officer needed more. Officer Moore's tactics of allegedly paying some unknown, nonregistered person unreported/undocumented money from his own pocket to

provide unsupported information in which they have no personal knowledge reeks of corruption. This type of action cannot be considered as acting in good-faith to qualify under the exception.

F. Defendant/Appellee maintains that the ruling on the motion to suppress should be affirmed and that Plaintiff/Appellant's argument regarding disqualification is moot. However, if reversed, it is clear and undisputed that there was not a motion to disqualify properly raised in the court below. MCR 2.003; *In re Schmiltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). However, absent a lower court ruling on the disqualification issue, the court may choose to remand a case to a different lower court judge if the record indicates that the original judge would have difficulty putting previously expressed views or findings out of his or her mind. *Fenheny v. Caldwell*, 175 Mich App 291, 309-310, 437 NW2d 358 (1989). Ordinarily, a showing of actual, personal prejudice is required to disqualify a judge under the court rule, and the party raising the issue has a burden of overcoming a presumption of impartiality. *Cain v. Dep't of Corrections*, 451 Mich 470, 497, 512-513, 548 NW2d 210 (1996). That a judge repeatedly rules against a litigant, even if the rulings are erroneous, does not establish disqualification based on bias or prejudice. *Armstrong v. Ypsilanti Chapter Twp.*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001). Critical or hostile remarks made by a trial judge to counsel or the parties during trial do not usually establish disqualifying bias either. *Cain*, supra at 497 n 30.

Plaintiff/Appellant does not obviously like the ruling by Judge Morrow; however, the record does not reveal any personal prejudice or bias on the part of the trial court or any other reason to remand to a different trial judge. The fact that Judge Morrow did not believe Officer Moore's observations set forth in the affidavit does not constitute personal prejudice or bias. As discussed previously, Judge Morrow is allowed to weigh the credibility of the person who appear before him, which supported his ruling to suppress the evidence. The merely unfavorable rulings

against Plaintiff/Appellant are insufficient for disqualification. Thus, this Court has no reason to remand this case to a different trial judge, if his ruling on the suppression motion is reversed.

In the case at bar, Officer Moore's affidavit lacked facts to support whether his alleged unregistered confidential informant was credible or reliable or that he spoke with personal knowledge. The only information Officer Moore provides regarding his alleged informant is that he was used over ten times in the past resulting in confiscations of narcotics, weapons and multiple felony arrests. Officer Moore failed to demonstrate how his alleged unregistered informant knew that narcotics were being sold from the target address. This informant gave no description of the interior of the home, no description of the packaging and location of the alleged narcotics, no name of the seller, nor any other fact to substantiate his allegation. In the four corners of the search warrant it was never alleged that the confidential informant spoke with personal knowledge, or had ever been to the target house. The confidential informant was never alleged to have seen or purchased narcotics from the subject location or seller. The only information the informant provided was rumors that some unknown person allegedly told him. The affidavit also fails to show that the affiant saw any narcotics, hand to hand sells or visible drug transactions to support that drugs were inside the home. "There must be some basis to conclude that the informant is being credible or reliable. *People v Howey*, 118 Mich App 431 (1982). An affidavit must show that the informant spoke with personal knowledge. *People v Sherwood*, 171 Mich App 103 (1988). Here, it is undisputed that this requirement was not met. If these requirements are not met, the affidavit must be considered as if the informant's statements were not included. *People v David*, 119 Mich App 289 (1982). Furthermore, some independent police investigation to corroborate allegations of criminal activity by an informant is an indispensable element for determining the reliability of the

allegations when no other indicia of the informant's credibility or veracity are available. *See Spinelli,* 393 U.S. 410 at 416, 89 SCt. 584 at 589.

Here, Officer Moore stated in his sworn affidavit that he conducted surveillance at the target home, Officer Moore knowingly and intentionally or with a reckless disregard for the truth inserted this false material into his sworn affidavit in an effort to establish probable cause of criminal activity. The following reasons support Officer Moore's deliberate or reckless falsities.

Ten (10) day after receiving an alleged tip from an unregistered informant, Officer Moore states that he conducted surveillance of the target home. Officer Moore states that within a thirty (30) minute period, he observed five (5) individuals walk to the front door of the target address and a black male approximately 25-27 years of age opened the door allowing each person inside of the home. Nonetheless, the Defendant, here resides alone. There is no person meeting that age description who resides in the home, who has control of the home or who otherwise has any type of permission or authority to allow people to enter into the target home. The Defendant's next door neighbor, Angela Jones, affirms that the Defendant resides alone. She also affirms that she hasn't observed a young black male meeting that age description who had or even appeared to have authority or control to allow people to enter the residence. If Officer Moore saw a black male inside of the target, he would be at least a 40-42 years old man. Defendant was 41 years old at the time of the alleged surveillance. Thus, it seems that Officer Moore either deliberately or recklessly inserted a falsity in his affidavit to attempt to establish probable cause.

Officer Moore went on to describe each of the five (5) people who allegedly went inside of the home stay for less than a minute and exit the home. Remember that Officer Moore alleges to be conducting surveillance, meaning he placed himself in a discreet location to observe the target home. He described the color of each person's hair and clothing. However, what's extremely

disturbing is that Officer Moore claims to have observed the brown eyes and the brand of gym shoes on one of the individuals. It is highly unlikely that detail, such as eye color, could have been observed from a location where an undercover officer is trying to be inconspicuous and careful not to blow his cover while he surveils a target home. Not only does Officer Moore's claim of having observed eye color scream deliberate or reckless falsity, but the fact that the Defendant does not use his front door also yells falsity.

The Defendant adamantly disputes that his home is a location for narcotics trafficking. The Defendant does not dispute that family, friends or acquaintances may arrive at his home for an occasional visit. However, for at least the past year his company have been accustomed to and only uses the side door for entry into his home. The Defendant's next door neighbor, Angela Jones, confirms that she can view the Defendant's front porch, but she only observes people using the side door as opposed to the front door of Defendant's home. Ms. Jones has lived next door to Defendant for many years and also confirms that she does not observe any heavy traffic coming and going from Defendant's home.

Defendant filed two motions, first, a Motion to Quash the invalid Search Warrant due to a lack of sufficient evidence for finding of Probable Cause. The affiant was Detroit Police Officer Lynn Moore. The Trial Court denied Defendant's motion. However it was uncontested, the alleged confidential informant had never bought or seen drugs at resident target location. It is also uncontested that the Search Warrant failed to provide any allegations that the confidential informant had ever been to the target location or had any personal knowledge about the seller. The Trial Court reluctantly ruled that the motion was denied due to the sparse information that the affiant claimed that he saw an unknown individual come and go while one individual stated to

him, "yah, they up right now, just got to the front door and they will hook you up." Due to this false statement, Defendant's Motion to Suppress was denied.

It is undisputed that Officer Moore's confidential informant did not provide any allegations in his Search Warrant, that his confidential informant spoke from personal knowledge. It is also uncontested that Officer Moore did not see any hand to hand sells, narcotics, or money being exchanged. The last remaining factual claim in the affidavit is the contested claim that an unknown individual, after leaving the area told Officer Moore that, "Yah, they up right now, just go to the front door and they will hook you up." Again this alleged individual has not in any way shown to be credible or reliable. This unknown individual was not alleged to have been seen with any narcotics or passing any money. Officer Moore did not make any observations or have any knowledge that this unknown person had committed a crime or was involved in drugs.

In People v. Adams 2014 WL 4723800 (Docket No. 316114, September 23, 2014) one month prior to our case, The Court of Appeals heard a very similar argument involving Officer Lynn Moore. (Ex). In People V. Adams, Id. Officer Moore swore to an affidavit stating that an unregistered confidential informant told him that he saw Keith trafficking Cocaine out of a residence during the previous week. Officer Moore alleged that he went to the location and saw a couple individuals meet with Defendant Adams within thirty-five (35) minutes. Moore claimed to have seen the individuals make actual drug transactions. Nonetheless he claimed that he approached the second unknown and unidentifiable person who told him, "I just copped, go see Big Boy he will hook you up." On April 26, 2013, Officer Moore refused to appear for the Evidentiary Hearing.

In the present case, Moore didn't claim to have seen any hand to hands, small objects exchanged, or money; just his proverbial catch all phrase, some unknown guy who I can't locate

told me that they will hook me up. Nonetheless, without the alleged confidential informant claiming to have been inside of the target address seeing drug activity or Officer Moore seeing a suspected hand to hand sale. The alleged statement from the unidentifiable phantom street walker is insufficient to support a finding of Probable Cause for the issuance of the Search Warrant.

RELIEF

Mr. Franklin hereby request that this Honorable Court 1) reverse the decision of the Michigan Court of Appeals and 2) reverse the Trial Court's denial of Defendant's Motion to Suppress the Invalid Search Warrant.

REQUEST FOR ORAL ARGUMENT

Defendant/Appellee requests oral argument in this case.

Respectfully Submitted,

/s/Randall P. Upshaw

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